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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ALBERTO ACOSTA,

Defendant and Appellant.

B151641

(Super. Ct. No. PA033839)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Shari K. Silver, Judge. Modified and, as so modified, affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant
and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec,
Supervising Deputy Attorney General, and Chung L. Mar, Deputy Attorney General, for
Plaintiff and Respondent.

Luis Alberto Acosta appeals the judgment entered after conviction by jury of first-degree murder committed for the benefit of a criminal street gang in which Acosta personally discharged a firearm causing death. (Pen. Code, §§ 187, 186.22, subd. (b)(1), 12022.53, subd. (d).) ¹ The trial court sentenced Acosta to a term of 53 years to life in state prison. We modify the judgment to strike the three-year enhancement imposed under section 186.22, subdivision (b)(1), and, as so modified, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Prosecution's evidence.

Viewed in accordance with the usual rule of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established that on the afternoon of July 21, 1999, Langdon Street gang member David Salcido approached numerous Monroe High School students at the corner of Nordhoff Street and Langdon Avenue and made gang related threats. Salcido asked where the students were from and when they responded “nowhere,” Salcido said, “This is all about Langdon” and, “Fuck that. This is Langdon Street.”

Acosta, a Langdon Street gang member whose moniker is “Lil Spider” or “Spider” appeared at the scene shirtless with a rifle held along his right leg. Salcido and Acosta crossed Nordhoff Street and walked toward Langdon Avenue. Salcido then crossed the street and approached Monroe High student Giovanni Avelar who was walking alone. Salcido asked where Avelar was from and Avelar shook his head from side to side.

¹ Subsequent unspecified statutory references are to the Penal Code.

Acosta told Salcido to “rush him.” Salcido struck Avelar numerous times, then walked to the middle of the street. Salcido said, “Shoot him, Spider. Shoot him.” Acosta fired four shots at Avelar, then approached the fallen Avelar and prodded him with his foot.

Acosta and Salcido then approached Rene S., Amanda M., Cynthia C. and Carlos M., four of the Monroe High School students Salcido previously had threatened. Acosta pointed the rifle at the group and both Acosta and Salcido asked the students where they were from. One of the students, Rene S., replied “nowhere” and indicated he knew Acosta. Acosta then told Salcido, “Let’s book,” and the two departed the scene on foot.

Avelar died of a .22 caliber gunshot wound to the chest.

On July 23, 1999, Acosta told Los Angeles Police Detective Bradford Cochran the rifle had been discarded in a dumpster. Several hours later, police officers transported Acosta to the dumpster and searched it. When the officers failed to find the rifle, Acosta stated the dumpster already had been emptied.

On July 23, 1999, Rene S, Cynthia C., Amanda M. and Carlos M., selected Acosta’s picture from a photographic lineup and indicated he was the individual who shot Avelar. Amanda M. testified she knew Acosta and Salcido by their nicknames and had seen them in the neighborhood numerous times prior to this incident. Rene S. and Cynthia C. also identified Acosta at trial. Carlos M. was a reluctant trial witness who claimed lack of memory regarding this incident.

Two Los Angeles police officers testified as experts with respect to the allegation the charged offense had been committed for the benefit of a criminal street gang. Los

Angeles Police Officer Shawna Green testified Langdon Street is a violent gang whose members have committed murder, drive-by shootings, witness intimidation, felony assault and auto thefts. The gang controls the sale of narcotics in their neighborhood which included the scene of this shooting. In 1998, Acosta admitted to Green that he was an active member of the Langdon Street gang. Green testified the question, “where are you from,” is a challenge issued by a gang member to determine whether the individual questioned is a rival.

Los Angeles Police Officer Adrian Torres testified Acosta and Salcido both were active members of the Langdon Street gang.

Both officers opined the shooting of Avelar had been gang related because it was the type of offense gangs commit to gain control of a neighborhood, it was committed by two members of the Langdon Street gang in gang territory, both suspects claimed the Langdon Street gang during the offense, Salcido intimidated students prior to the shooting by asking where they were from and Acosta and Salcido intimidated the students who witnessed the shooting. Torres further opined Acosta was a “hard core” member of the Langdon Street gang because of the length of time he claimed membership, the numerous tattoos on his body and the fact he associates with other known Langdon Street gang members. ²

² Acosta’s tattoos included the letters “LST” on his left elbow, a spider tattooed on his right arm, the word “Langdon” on the back of his neck and the words “R.I.P. Anthony” on his left shoulder blade.

2. Defense evidence.

Acosta presented no affirmative defense.

3. Sentencing considerations.

The jury found Acosta guilty of willful, deliberate and premeditated murder. The jury further found Acosta committed the offense for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b), and that Acosta personally used a firearm within the meaning of section 12022.5, subdivision (a) and section 12022.53, subdivision (b), personally discharged a firearm within the meaning of section 12022.53, subdivision (c), and personally discharged a firearm causing death within the meaning of section 12022.53, subd. (d). The trial court sentenced Acosta to a term of 53 years to life in state prison consisting of 25 years to life for murder, plus 25 years to life for the personal discharge of a firearm causing death and three years for the gang enhancement. The trial court struck the remaining firearm use enhancements.

CONTENTIONS

Acosta contends the trial court erroneously allowed the gang experts to testify regarding the ultimate issue of the case, improperly refused to instruct on voluntary intoxication, and the 25-year-to-life term imposed for the firearm enhancement and the three-year gang enhancement must be stricken.

DISCUSSION

1. *The opinions of the gang experts.*

Acosta contends the trial court erroneously allowed the gang experts to express the opinion that Acosta murdered Avelar with the specific intent to promote, further, or assist criminal conduct by gang members. Acosta claims this testimony invaded the province of the jury with respect to the gang enhancement allegation, undermined the jury's finding on the degree of the murder and violated the rule an expert may not express an opinion that consists only of inferences that can be drawn as easily by the trier of fact. (*In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1118.) Acosta argues these opinions improperly went to the ultimate issue of the case, constituted an opinion as to Acosta's state of mind in violation of section 29, and an opinion as to whether the crime of first-degree murder had been committed. (*People v. Smithey* (1999) 20 Cal.4th 936, 960-961; *People v. Gardeley* (1996) 14 Cal.4th 605, 619; *People v. Torres* (1995) 33 Cal.App.4th 37, 48.) Acosta argues this court must address the issue, notwithstanding defense counsel's failure to object below, because the trial court had a sua sponte duty to exclude improper evidence and counsel's failure to object constitutes ineffective assistance. Acosta asserts the error cannot be seen as harmless because these improper opinions reduced the prosecution's burden of proof and a different result was probable absent the error.

Initially, we note Acosta objected only to the opinion expressed by Torres as cumulative to the opinion expressed by Green. Because Acosta failed to object in the

trial court on the ground he raises on appeal, the issue has not been preserved. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Saunders* (1993) 5 Cal.4th 580, 590-591; Evid. Code, § 353.) However, even if this shortcoming is overlooked, the claim fails on the merits.

Expert testimony is admissible to explain any subject matter that is “sufficiently beyond common experience [such] that the opinion of an expert would assist the trier of fact” (Evid. Code, § 801, subd. (a).) “The . . . culture and habits of criminal street gangs . . . meets this criteria.” (*People v. Gardeley, supra*, 14 Cal.4th at p. 617; *People v. Ochoa* (2001) 26 Cal.4th 398, 438; *People v. Williams* (1997) 16 Cal.4th 153, 195; *People v. Champion* (1995) 9 Cal.4th 879, 921-922.) “ ‘There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case.’ [Citations.] ‘ “[T]he true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved” ’ [Citation.]” (*People v. Valdez* (1997) 58 Cal.App.4th 494, 507.) A trial court’s decision to admit expert testimony is reviewed for an abuse of discretion. (*People v. Catlin* (2001) 26 Cal.4th 81, 131; *People v. Davenport* (1995) 11 Cal.4th 1171, 1207.)

In *People v. Gardeley, supra*, 14 Cal.4th 605, the California Supreme Court held the trial court properly admitted a police detective’s expert testimony that a criminal incident was “gang-related activity” because gang members typically commit such crime to secure their “drug-dealing stronghold.” (*Id.* at p. 619.) Similar results were reached in

People v. Zepeda (2001) 87 Cal.App.4th 1183, 1208, and *People v. Valdez, supra*, 58 Cal.App.4th at pp. 507-509. In *Zepeda*, an expert testified the motivation for a gang-related violent crime might be to “reestablish” the accused within the gang or the gang within the community by sending the message the defendant “means business.” (*People v. Zepeda, supra*, at p. 1208.) *Valdez* held the trial court properly admitted a police detective’s expert opinion the charged offense had been committed for the benefit of a criminal street gang. *Valdez* found the trial court reasonably could conclude the expert opinion would assist the jury and that the “opinion was not tantamount to an opinion on guilt” or the truth of the gang enhancement because the People had to prove numerous other elements. (*People v. Valdez, supra*, at p. 509.)

Had Acosta raised the issue below, a similar result would have obtained here. The trial court reasonably could conclude the jurors would be assisted by expert testimony regarding the manner in which the actions of Acosta and Salcido benefited the Langdon Street gang and, because other elements had to be proved, the opinions were not tantamount to an opinion on guilt.

Acosta’s reliance on section 29 to preclude expert opinion testimony regarding state of mind is misplaced. Section 29 provides an expert testifying about a defendant’s mental illness, mental disorder or mental defect shall not testify whether the defendant had the mental state required for the offense such as purpose, intent, knowledge, or malice aforethought. Because the police officer experts in this case were not testifying about a mental disease or defect, section 29 does not apply. For the same reason,

People v. Smithey, *supra*, 20 Cal.4th 936, fails to assist Acosta. In *Smithey*, a psychiatrist testified about the defendant's mental disorders, thereby bringing that case within the prohibition of section 29.

Finally, even assuming for the sake of discussion the trial court should have excluded the opinions expressed by Green and Torres, their conclusion the murder was committed for the benefit of a criminal street gang flowed irresistibly from the facts of this case. That is, based on the testimony of the Monroe High School students who witnessed the shooting of Avelar and the expert testimony of the officers related to the manner in which criminal street gangs control their territory, this crime clearly was committed in order to intimidate the community and strengthen the Langdon Street gang's control of the neighborhood. Because there is no reasonable probability of a different result without the asserted error, Acosta cannot show prejudice. Absent prejudice, Acosta's claim of error and his claim of ineffective assistance of counsel fail. (*People v. Staten* (2000) 24 Cal.4th 434, 450-451; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.)

2. The trial court properly refused to instruct on voluntary intoxication.

Sixteen-year-old Cynthia C., one of the Monroe High students who witnessed the murder, testified she formed the opinion Acosta was under the influence of some drug at the time of the shooting because his eyes were red and bloodshot and he was "kind of breathing hard." Cynthia C. indicated she previously had seen similar signs of intoxication in others but admitted she did not know whether Acosta was under the

influence on the day of the shooting and, on redirect examination, admitted she had no training in drug recognition and was guessing that Acosta was under the influence.

Based solely on Cynthia C.’s testimony, Acosta sought instruction on voluntary intoxication in the words of CALJIC Nos. 4.21 and 4.22.³ The trial court initially indicated it believed it had an obligation to instruct on voluntary intoxication as it relates to specific intent based on Cynthia C.’s testimony. The prosecutor objected on the ground the evidence of intoxication was minimal and had been provided by a “lay witness with no apparent expertise in the area.” The trial court indicated it would give the requested instruction over the People’s objection “in an abundance of caution.” The next day, the prosecutor renewed the People’s objection citing *People v. Williams* (1997) 16 Cal.4th 635. The trial court reconsidered its previous ruling and refused the

³ CALJIC No. 4.21 states: “In the crime’s of _____, [_____,] [and _____,] of which the defendant is accused in Count[s] _____, [or that of _____, which [is a] [are] lesser crime[s] thereto,] [or in the allegation that _____] a necessary element is the existence in the mind of the defendant of the [specific intent to _____] [mental state[s] of _____]. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether the defendant had the required [specific intent] [mental state]. [¶] If, from all the evidence you have a reasonable doubt whether the defendant formed that [specific intent] [mental state[s], you must find that [he] [she] did not have that [specific intent] [mental state[s]].

CALJIC No. 4.22 states: “Intoxication of a person is voluntary if it results from the willing use of any intoxicating liquor, drug or other substance, knowing that it is capable of an intoxicating effect or when [he][she] willingly assumes the risk of that effect. [¶] Voluntary intoxication includes the voluntary ingestion, injecting or taking by any other means of any intoxicating liquor, drug or other substance.”

instructions indicating Cynthia C.'s testimony constituted "scant evidence" of intoxication within the meaning of *Williams*.

On appeal, Acosta contends the trial court's ruling was error. Acosta asserts a lay witness's testimony regarding the sobriety of an individual is admissible and thus Cynthia C.'s testimony properly could have formed the basis for the conclusion Acosta lacked the required specific intent for murder. Acosta claims the trial court's reliance on *Williams* was misplaced because that case involved testimony the defendant was "probably spaced out" at the time of the offenses, and the defendant's admissions he was "doped up and 'smokin' pretty though then." *Williams* concluded these statements, considered together, did not supply substantial "evidence . . . that voluntary intoxication had any effect on defendant's ability to formulate intent." (*People v. Williams, supra*, 16 Cal.4th at p. 678) Acosta claims Cynthia C. testified unequivocally that, at the time of the shooting, Acosta exhibited symptoms of intoxication she had observed in others. Acosta asserts the refusal to give these instructions undermined defense counsel's argument to the jury that Acosta lacked the ability to form the required intent due to his intoxication. Further, the trial court's refusal to instruct permitted the jury to ignore evidence of voluntary intoxication which otherwise might have raised a reasonable doubt as to the specific intent elements of the charges. Acosta asserts the error is tantamount to failure to instruct on a lesser included offense that requires reduction to the lesser offense or retrial. (*People v. Ervin* (2000) 22 Cal.4th 48, 91.)

We disagree. “Notwithstanding the abolition of the diminished capacity defense, evidence of voluntary intoxication is relevant to the extent it bears upon the question whether the defendant *actually* had the requisite specific mental state required for commission of the crimes at issue.” (*People v. Horton* (1995) 11 Cal.4th 1068, 1119.) A defendant is entitled to instructions on voluntary intoxication when there is substantial evidence of the defendant’s voluntary intoxication and the intoxication affected the defendant’s “ ‘actual formation of specific intent.’ ” (*People v. Williams, supra*, 16 Cal.4th at p. 677; *People v. Horton, supra*, at p. 1119.)

As in *People v. Williams, supra*, 16 Cal.4th 635, Cynthia C.’s testimony was insubstantial and there was no evidence that voluntary intoxication had any effect on Acosta’s ability to formulate intent. (*Id.* at pp. 677-678.) A similar result was reached in *People v. Williams* (1988) 45 Cal.3d 1268, 1311-1312, where a witness testified the defendant acted like he had consumed LSD, and *People v. Carr* (1972) 8 Cal.3d 287, 294-295, where evidence the defendant had consumed an unspecified quantity of alcohol or drugs was insufficient to support instruction on diminished capacity. As the trial court concluded, this case is substantially similar to *People v. Williams, supra*, 16 Cal.4th 635, in that there was no evidence Acosta, in fact, had consumed any drugs prior to the murder or that consumption of drugs had any effect on his ability to formulate the specific intent required for the offense. Thus, the trial court properly refused Acosta’s request for an instruction on voluntary intoxication.

3. *The trial court properly imposed the 25-year-to-life enhancement under section 12022.53, subdivision (d).*

As previously noted, the jury found true allegations that in the commission of murder, Acosta personally used a firearm (§§ 12022.5, sub. (a)(1), 12022.53, sub. (b)), personally discharged a firearm (§12022.53, subd. (c)), and personally discharged a firearm causing death (§ 12022.53, subd. (d)). At the time of Acosta's offense, these statutes provide for increasingly severe enhancements of 3, 4 or 10 years, 10 years, 20 years to life and 25 years to life in state prison, respectively. The trial court imposed only the 25-year-to-life enhancement for personal discharge of a firearm causing death and stayed the remaining enhancements.

Acosta contends his sentence cannot be enhanced under either section 12022.53, subdivision (c) or subdivision (d) because these enhancements are implicit in a conviction of murder in which the defendant personally uses a firearm under section 12022.5, subdivision (a)(1) or 12022.53, subdivision (b). Acosta reasons the greatest enhancement that can be imposed in this case is the 10-year term triggered by section 12022.5, subdivision (a)(1), or section 12022.53, subdivision (b). Acosta claims the more serious firearm enhancements defined by section 12022.53, subdivisions (c) and (d) merge with the murder conviction and thus cannot form the basis of additional punishment. (*People v. Ireland* (1969) 70 Cal.2d 522, 539.)

Acosta also asserts the prohibition against multiple punishment found in section 654 prevents imposition of the greater enhancements.⁴ Acosta argues enhancements based on conduct must be treated like offenses and are subject to section 654 analysis in the same manner as offenses. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435]; *People v. Coronado* (1995) 12 Cal.4th 145, 157.) Acosta concludes application of section 654 here permits punishment only for murder in which he personally used a firearm. Thus, he cannot be punished both for murder and for discharging a firearm or discharging a firearm causing death.

These claims are meritless. The merger doctrine arises in the context of the felony murder rule. Under the merger doctrine, a conviction of felony murder may not be based on an underlying felony of assault or assault with a deadly weapon. *Ireland* reasoned that “[t]o allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law.” (*People v. Ireland, supra*, 70 Cal.2d at p. 539.) The doctrine was refined in *People v. Burton* (1971) 6 Cal.3d 375, 387, and *People v. Hansen* (1994) 9 Cal.4th 300, 315-316,

⁴ Section 654, subdivision (a), provides in relevant part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .”

but continues only to prohibit use of the felony murder rule to elevate felonious assaults to murder. Here, the jury convicted Acosta of willful, deliberate and premeditated murder. Because Acosta was not convicted on a theory of felony murder, the *Ireland* merger doctrine is completely inapplicable.

Nor is section 654 violated by the imposition of the 25-year-to-life enhancement. Section 12022.53, subdivision (d) provides: “*Notwithstanding any other provision of law*, any person who is convicted of [enumerated felonies including murder], and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury . . . or death, to any person other than an accomplice, shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony.” (Italics added.)

The italicized portion of section 12022.53, subdivision (d), reflects the clear intent that other provisions of law, such as section 654, do not apply. Moreover, even if section 654 analysis were appropriate, Acosta’s claim would still fail because he has not suffered multiple punishment or enhancement for the same criminal conduct. Acosta was punished once for murder and the term was enhanced once for the manner in which the murder was committed. “[S]ection 654 does not bar imposition of a single firearms use enhancement to an offense committed by the use of firearms, unless firearms use was a specific element of the offense itself. Indeed, where imposition of a firearms use enhancement is made *mandatory* notwithstanding other sentencing laws and statutes, it is

error to apply section 654 to stay imposition of such an enhancement. [Citations.]” *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1314.) Any other result would defeat the legislative intent that section 12022.53, result in substantially longer prison sentences for felons who use firearms in the commission of their crimes in order to protect our citizens and to deter violent crime. (*People v. Mason* (2002) 96 Cal.App.4th 1, 12; *People v. Martinez* (1999) 76 Cal.App.4th 489, 497-498.)

In sum, the trial court properly imposed the 25-year-to-life enhancement for the personal discharge of a firearm causing death.

4. *No improper dual conviction appears.*

Under a line of reasoning similar to that advanced above, Acosta asserts the enhancements under section 12022.53, subdivisions (c) and (d), must be stricken as improper multiple convictions under the rule precluding conviction of both the greater and the lesser offense. (*People v. Pearson* (1986) 42 Cal.3d 351, 359-360.) Acosta claims that under either the “legal elements” test or the “accusatory pleadings” test, enhancements under subdivisions (c) and (d), of section 12022.53 necessarily are included within a conviction of first degree murder in which the defendant personally uses a firearm.

Even assuming for the sake of discussion that a crime and an enhancement may be considered together in determining the act for which Acosta may be punished, Acosta is simply wrong in his assertion that first degree murder with the personal use of a firearm necessarily includes first degree murder in which the defendant personally discharges a

firearm or personally discharges a firearm causing death or great bodily injury.

Obviously, the enhancement under section 12022.53, subdivision (d), only applies to an individual who discharges a firearm causing death or great bodily injury. Because murder may be committed in a myriad of ways without personally discharging a firearm causing death, the enhancement is not necessarily included in a conviction of murder in which the accused personally uses a firearm. Rather than overlapping as Acosta claims, the enhancements reflect a deliberate legislative calibration of punishment for assaultive conduct resulting in death which would be frustrated if Acosta's argument were adopted.

5. The three-year gang enhancement.

The relevant provisions of section 186.22 as they read in 1999 when Acosta's offense was committed, are as follows: "(b)(1) Except as provided in paragraph (4), any person who is convicted of a felony committed for the benefit of, . . . any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony . . . , be punished by an additional term of one, two, or three years at the court's discretion. [¶] . . . [¶] (4) Any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." (Stats. 1997, ch. 500, § 2.)⁵

⁵ Section 186.22 has been substantially amended.

Acosta contends a three-year gang enhancement cannot be imposed because former section 186.22, subdivision (b)(4) controls where an indeterminate principal term is imposed. (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 485-486.) *Ortiz* held that when the minimum 15-year parole eligibility term applies, the determinate enhancement in section 186.22, subdivision (b)(1) cannot apply. “Nothing in Penal Code section 186.22, . . . suggests this extended parole eligibility limitation period should be combined with an additional determinate term.” (57 Cal.App.4th at pp. 485-486.) Applying this rule here, Acosta argues the three-year enhancement must be stricken.

Unlike the defendant in *Ortiz*, Acosta is not being subjected to both a 15-year minimum term prior to parole eligibility under former section 186.22, subdivision (b)(4), and a three-year enhancement under former subdivision (b)(1). Based on other provisions of law, Acosta will not be eligible for parole for the murder of Avelar until he has served a minimum of 25 calendar years. Addressing this specific situation, *People v. Herrera* (2001) 88 Cal.App.4th 1353, 1357, concluded that because the 15-year minimum term prior to parole eligibility is inapplicable, the three-year term found in subdivision (b)(1) properly may be imposed. The *Herrera* majority reasoned the phrase, “[e]xcept as provided by paragraph (4)” means that if paragraph (4) is inapplicable for any reason, then the determinate term of subdivision (b)(1) applies.

In the reply brief, Acosta urges this court to follow the concurring and dissenting opinion of Grignon J. in *Herrera*. Justice Grignon interpreted former section 186.22, subdivision (b)(4) to provide that if the minimum term prior to parole eligibility

associated with the indeterminate term attributable to the underlying offense already exceeds the 15-year minimum, the 15-year minimum has no mandatory effect but may be considered by the Board of Prison Terms when granting or denying parole. Justice Grignon concluded the fact the 15-year minimum term may not have any effect on the defendant does not permit the trial court to impose a determinate enhancement under former section 186.22, subdivision (b)(1).

People v. Montes (2002) 96 Cal.App.4th 518 was published shortly after Acosta filed the reply brief. ⁶ *Montes* held that where a defendant is sentenced to 25 years to life in state prison for personally discharging a firearm causing death or great bodily injury in the commission of an offense within the meaning of section 12022.53, subdivision (d), an indeterminate term has been imposed and an additional determinate enhancement may not be imposed.

We agree with the *Montes* result. Where, as here, a defendant is sentenced to an indeterminate term, former section 186.22, subdivision (b)(4) mandates service of 15 years prior to parole eligibility. Where former section 186.22, subdivision (b)(4), applies, a determinate enhancement under section 186.22 subdivision (b)(1) is inappropriate. As *Montes* reasoned, “Apparently, the Legislature concluded that anyone committing a felony punishable by life imprisonment on behalf of a gang would be punished sufficiently by the extended parole eligibility date and, thus, it opted not to additionally

⁶ The Supreme Court has extended the time for grant or denial of review in *Montes* to July 5, 2002.

impose . . . the sentence enhancements enumerated in subdivision (b)(1).” (*People v. Montes, supra*, 96 Cal.App.4th at p. 527.)

Here, Acosta received an indeterminate term for the murder of Acosta and an indeterminate enhancement for the personal discharge of a firearm causing death. Because this case is one in which the provisions of former subdivision (b)(4) of section 186.22 apply, we grant Acosta’s request to strike the three-year gang enhancement.

DISPOSITION

The judgment is modified to strike the three-year enhancement imposed under Penal Code section 186.22, subdivision (b)(1), and, as so modified, affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.